BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLES D. WATERS	)	
Claimant	)	
	)	
VS.	)	
	)	
SPIRIT AEROSYSTEMS, INC.	)	
Respondent	)	Docket No. **1,033,959**
	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the December 3, 2008 Award by Administrative Law Judge Thomas Klein. The Board heard oral argument on February 20, 2009.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for the claimant. Eric K. Kuhn of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The parties agreed that claimant suffered a compensable injury on March 8, 2007. But the parties were unable to agree upon the extent of disability claimant suffered as a result of that accidental injury. Respondent argued claimant was limited to his functional impairment and claimant argued he was entitled to a work disability.

The Administrative Law Judge (ALJ) found claimant did not sustain his burden of proving a work disability as he was terminated for cause. Consequently, the ALJ limited claimant's award to a 2.5 percent permanent partial whole person functional impairment.

Claimant requests review and argues he is entitled to an 89.5 percent work disability based upon Drs. Estivo and Murati's task loss opinion of 79 percent and a 100 percent wage loss. Claimant initially argues that there is no good faith requirement in K.S.A. 44-510e and he is entitled to a work disability. In the alternative, claimant argues he demonstrated a good faith effort to retain his employment and accordingly is entitled to a work disability analysis.

Respondent argues claimant has not sustained his burden of proof that he has any permanency associated with the injury. In the alternative, respondent argues claimant was terminated due to attendance violations which demonstrates a lack of good faith. Respondent further argues that but for claimant's lack of good faith in retaining his employment he would still be earning his pre-injury wage and therefore, claimant's pre-injury wage should be imputed which would limit claimant's award to his functional impairment. Finally, respondent argues the doctrine of collateral estoppel prevents claimant from denying he was terminated due to his own misconduct.

The sole issue for the Board's determination is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Initially, the Board must address an objection to evidence proffered at the deposition of Deborah S. Vandegrift. Respondent relies upon that evidence to make a collateral estoppel argument regarding the good faith effort of claimant to retain his employment. As noted, at the deposition of Deborah S. Vandegrift, respondent offered into evidence certain unemployment records. Claimant timely objected. The Board has considered this matter and finds the objection should be sustained.

K.A.R. 50-4-2, the regulation governing disclosure of unemployment records, provides in pertinent part as follows:

> (4) Information shall be disclosed upon written request of either of the parties or their representatives for the purpose of administering or adjudicating a claim for benefits under the provisions of any other state benefit program if both of the following conditions are met:
>
> (A) The written request is accompanied by a subpoena or order for records production from an administrative law judge or other official.

> (B) The written request states that the requested information will not be released or published in any manner. The introduction of any information disclosed as evidence at a public hearing or as part of a record available to the public shall constitute publication.

Records introduced in a workers compensation case must be considered evidence at a public hearing as a record that is available to the public. The introduction into the workers compensation records, therefore, constitutes a publication and would be in violation of the above-quoted regulation. The Board concludes, even if the workers compensation case is considered to be a "state benefit program" the regulation would prohibit the introduction and disclosure of the record into the workers compensation proceedings. Accordingly, the claimant's objection to the introduction of the unemployment records is sustained and they cannot be considered part of the evidentiary record.

As previously noted, the parties agree claimant suffered a compensable work-related injury due to a series of repetitive injuries and stipulated to a March 8, 2007 date of accident which was claimant's last day worked.

Claimant's back complaints began in January 2007 and he sought treatment from his personal physician Dr. Roger Thomas. X-rays were taken and claimant was prescribed medication. As he continued working his pain worsened until Dr. Thomas took him off work from March 9, 2007 through March 21, 2007.

On March 9, 2007, claimant called into work and advised his lead man that he needed some time off work due to back pain and that he would be off for some time. Claimant did not call in again because he assumed that he had enough vacation and sick leave to cover his absence. On a previous occasion claimant had injured his knees and had only called in one time to report that he would be off work. He was not disciplined at that time for failing to call in every day. And when he took time off from work for a double hernia operation he had only called in once and was ultimately off work for eight weeks. However, that leave may have been approved through the Leave of Absence office.

On cross-examination claimant agreed that he was aware that there had been an old policy that it was necessary to call in before the fourth day of absence from work. And that he had been advised of the attendance standards in August 2000 after he had missed some work.

On March 21, 2007, claimant was called by respondent's personnel representative and told that if he did not report back to work on the following day his employment would be terminated. He was also told he had been sent a certified letter making the same demand but claimant stated that he had not received the letter before he got the telephone call.

Claimant reported to work on March 22, 2007, and went to the medical section but was told he could not be seen until noon. He was further told he needed a release to return to work from his physician. Claimant then went to his doctor and obtained the release and he also went to the post office to get the certified letter to see what it said. Upon his return to the medical station he finally saw the nurse who ultimately released him to work. But when he reported to his work station he was told that he had been terminated.

Claimant was told that he had been terminated for failing to call in every day that he was off work. Claimant further testified that he did not recall ever being told that there was a policy to call in every day that he would be off work. Claimant stated that had he been aware of that procedure he would have called in every day until told that he did not need to keep calling.

After a May 3, 2007 preliminary hearing, the respondent was ordered to provide claimant with medical treatment. Dr. John P. Estivo, board certified in orthopedic surgery, was designated to provide treatment to the claimant. Dr. Estivo first examined and evaluated claimant on June 21, 2007, and noted claimant had complaints of thoracic spine pain. After taking a history and performing a physical examination, the doctor diagnosed claimant as having thoracic spine pain, kyphosis to the thoracic spine and possible Scheuermann's disease. Dr. Estivo recommended an MRI of the thoracic spine and laboratory tests to confirm or rule out Scheuermann's disease which was later ruled out.

On July 2, 2007, claimant was seen again by Dr. Estivo for a follow-up after the MRI and claimant's continued complaints of thoracic spine pain. The MRI revealed a kyphotic thoracic spine. Dr. Estivo diagnosed a thoracic spine strain and thoracic kyphosis. The doctor recommended physical therapy for the thoracic spine and recommended claimant continue taking Celebrex. The doctor imposed temporary restrictions of lifting no more than 20 pounds and limiting bending, twisting and stooping to no more than one-third of a work day.

Claimant was again examined and evaluated on August 13, 2007. Dr. Estivo noted that claimant continued to have some thoracic spine pain. At this point in the treatment Dr. Estivo still thought claimant probably had Scheuermann's disease which was not work related and that the thoracic spine strain was resolving. The doctor concluded claimant was at maximum medical improvement with no impairment and needed no restrictions.

On October 3, 2007, Dr. Paul Stein performed an examination and evaluation of claimant at the ALJ's request. Based upon his examination, the doctor diagnosed claimant with a possible soft tissue discomfort. Dr. Stein's examination and evaluation appeared to be primarily focused on claimant's upper extremities which were the subject of a

separate worker's compensation claim. Based on the AMA *Guides*[1], Dr. Stein did not find any permanent impairment due to claimant's upper back complaints. But the doctor, in a report prepared after a discussion with respondent's counsel, noted that he did not believe any permanent work restrictions are indicated for the upper back over and above those he had already recommended for claimant's upper extremities in a separate claim. The doctor noted that if using vibratory tools or impacting power tools caused claimant pain in the upper back it would be reasonable to avoid such activities.

Dr. Pedro Murati examined claimant on November 14, 2007, at the request of claimant's attorney. Dr. Murati performed a physical examination of claimant and diagnosed claimant with myofascial pain syndrome affecting the bilateral shoulder girdles extending into the cervical and thoracic paraspinals and right SI joint dysfunction. The doctor opined the conditions were the direct result of claimant's work-related injuries.

Based upon the AMA *Guides*, the doctor opined claimant had a 15 percent whole person functional impairment. The 15 percent includes 5 percent for myofascial pain syndrome affecting the cervical paraspinals, 5 percent myofascial pain syndrome affecting the thoracic paraspinals and 5 percent for low back pain secondary to lumbar strain. The doctor imposed permanent restrictions that in an 8-hour day the claimant should engage in no climbing ladders or crawling, no lifting, carrying, pushing or pulling greater than 20 pounds, no above shoulder work and no work more than 24 inches from the body. Claimant should rarely bend, crouch and stoop. He should occasionally sit, climb stairs, squat or drive as well as rarely stand or walk. Claimant should also avoid awkward positions of the neck.

Dr. Murati reviewed the list of claimant's former work tasks prepared by Mr. Hardin and concluded claimant could no longer perform 11 of the 14 non-duplicated tasks for a 79 percent task loss.

Dr. Estivo performed a final examination of claimant on March 20, 2008. The doctor noted that claimant's thoracic spine pain had not improved and Scheuermann's disease had been ruled out. Consequently, Dr. Estivo concluded the claimant's thoracic spine strain was caused by his work related injury. Based on the AMA *Guides*, Dr. Estivo rated claimant's thoracic spine strain at 5 percent. Doctor Estivo agreed that claimant had a long history of thoracic back problems and that a portion of his impairment would include his pre-existing condition. And the doctor stated if claimant had a long history of treatment for his back pain then he would apportion his rating 50 percent pre-existing and 50 percent to this work-related injury. Dr. Estivo placed permanent restrictions on claimant of no lifting greater than 40 pounds and limited bending, stooping and twisting to no more than one-third of a full work day. Dr. Estivo reviewed the list of claimant's former work tasks

[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

prepared by Mr. Hardin and concluded claimant could no longer perform 11 of the 14 non-duplicated tasks for a 79 percent task loss.

Jerry D. Hardin, a personnel consultant, conducted a personal interview with claimant on January 21, 2008, at the request of claimant's attorney. He prepared a task list of 14 nonduplicative tasks claimant performed in the 15-year period before his injury. At the time of the interview, claimant was not working. Mr. Hardin opined claimant has the ability to earn $320 per week. On cross-examination, Mr. Hardin agreed that if claimant did not have any permanent impairment or restrictions placed on him by Dr. Stein then claimant would not have any wage loss or task loss.

Deborah S. Vandegrift, respondent's human resources and employee relations consultant, testified that claimant had received the company's attendance guidelines and standards on August 10, 2000, and therefore he was aware of the attendance policy with regard to contacting the company. Ms. Vandegrift stated respondent's policy is that if an employee is absent for three or more days without contacting the company, that is considered a job abandonment situation and the employee is sent a letter that they need to return or contact the company. But if an employee is absent more than three consecutive days and has no time to cover the absences then the employee is subject to termination for extended absence. There is also a leave of absence policy that provides if an employee is going to be absent for an extended period of time they are to contact the leave office and request a leave of absence.

When Ms. Vandegrift was told claimant had been absent six consecutive days she sent him a letter telling him to report back to work or if unable to return to work due to a medical condition to contact the leave of absence office. The letter stated:

> You have been absent since 03/09/2007, to date you have not made contact with the company of your absence. This is considered Job Abandonment, which is a company rule violation of the Spirit AeroSystems, Inc. Attendance Guidelines. Your employment with the Company could result in you being terminated upon another instance of absence or tardiness. You must report back to work the very next work day following receipt of this letter.
>
> If you are unable to return due to medical reasons, you must contact our Leave of Absence Office (LOA) at 523-4556 the day of receipt of this letter.
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> Failure to report to work or contact the LOA Office may result with immediate termination of your employment.[2]

But when claimant returned to work as directed in the letter he was nonetheless terminated from employment because he did not have sufficient time to cover his absences and he

[2] Vandegrift Depo., Ex. 1.

had not requested a leave of absence. He was terminated for extended absence. Ms. Vandegrift stated that since claimant had a doctor's excuse for his absence, if he had provided that information to the leave of absence department his job might not have been terminated.

The doctors' opinions regarding the claimant's functional impairment ranged from Dr. Stein's 0 percent to Dr. Murati's 15 percent whole person rating. The treating physician rated claimant's whole person functional impairment at 5 percent. The ALJ found Dr. Estivo's opinions most persuasive and the Board agrees. However, the ALJ deducted 50 percent from Dr. Estivo's functional impairment rating based upon his comments that 50 percent of that rating might be attributable to claimant's pre-existing condition.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injury is an aggravation of a preexisting condition. The Act reads:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[3]

The Board interprets the above statute to require that a ratable functional impairment must preexist the work-related accident. The statute does not require that the functional impairment was actually rated or that the individual was given formal medical restrictions. But it is critical that the preexisting condition actually constituted an impairment in that it somehow limited the individual's abilities or activities.

A physician may appropriately assign a functional impairment rating for a preexisting condition that had not been previously rated. However, the physician in most instances should use the claimant's contemporaneous medical records regarding the prior condition. The medical condition diagnosed in those records and the evidence of the claimant's subsequent activities and treatment must then be the basis of the impairment rating using the appropriate edition of the AMA *Guides*.

As Dr. Estivo's reduction of claimant's 5 percent rating did not comply with the proper method to establish a percentage deduction for a preexisting condition it will be disregarded and the Board finds claimant has suffered a 5 percent whole person functional impairment (Dr. Estivo's rating before deduction for a pre-existing condition).

Respondent next argues that claimant is limited to his functional impairment because he did not make a good faith effort to retain his employment with respondent that

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[3] K.S.A. 44-501(c).

paid his pre-injury average weekly wage. Conversely, claimant argues that he made a good faith effort to retain his job as he attempted to return to work as directed but was nonetheless terminated.

Because claimant has sustained injuries that are not listed in the "scheduled injury" statute, his permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a). That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[4] and *Copeland*.[5] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wage should be based upon the worker's ability to earn wages rather than the actual post-injury wages being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related injury.

The Board has also held workers are required to make a good faith effort to retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates or fails to make a good faith effort to retain a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage. On the other

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[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). But see *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007), in which the Kansas Supreme Court held, in construing K.S.A. 44-510e, the language regarding the wage loss prong of the permanent disability formula was plain and unambiguous and, therefore, should be applied according to its express language and that the Court will neither speculate on legislative intent nor add something not there.

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

hand, employers must also demonstrate good faith. The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.

In this case, the dispute centers around claimant's termination from employment. Simply stated, the claimant received a letter directing him to return to work or he might face termination. Claimant returned to work as directed, retrieved a doctor's slip as directed and then was directed to his work station where he was terminated. And the human resources' consultant agreed that had claimant been directed to the Leave of Absence office and had he presented his doctor's slip there he might well have not been terminated. Based upon the circumstances claimant made a good faith effort to attempt to retain his employment. Moreover, the absence from work was due to back pain caused by his work-related injury. Accordingly, claimant is entitled to a work disability analysis.

Although the Board concludes claimant made a good faith effort to retain his employment, it must also be determined whether claimant made a good faith effort to find appropriate employment after he was terminated. At the regular hearing, claimant provided a detailed list of the prospective employers he had contacted seeking employment. Although claimant's job search efforts have been unsuccessful, the Board finds he has engaged in a good faith effort to find appropriate employment. Consequently, claimant has a 100 percent wage loss.

The work disability formula requires that the percentage of wage loss and task loss be averaged to arrive at the percentage of permanent partial disability.[6] Dr. Estivo provided the most persuasive opinion regarding claimant's permanent restrictions and he opined claimant has suffered a 79 percent task loss. The 100 percent wage loss averaged with the 79 percent task loss results in an 89.5 percent work disability.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Thomas Klein dated December 3, 2008, is modified to find claimant has suffered a 5 percent permanent partial functional impairment and is entitled to compensation for an 89.5 percent work disability.

The claimant is entitled to permanent partial disability compensation at the rate of $483 per week not to exceed $100,000 for an 89.50 percent work disability.

As of June 30, 2009, there would be due and owing to the claimant 120.71 weeks of permanent partial disability compensation at the rate of $483 per week in the sum of $58,302.93 which is due and ordered paid in one lump sum less amounts previously paid.

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[6] K.S.A. 44-510e(a).

Thereafter, the remaining balance in the amount of $41,697.07 shall be paid at the rate of $483 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of June 2009.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge